United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

No. 76-7052

United States Court of Appeals

FOR THE SECOND CIRCUIT

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NELSON BUNKER HUNT, W. HERBERT HUNT and LAMAR HUNT,
Plaintiffs-Appellants,

P/S

—against—

MOBIL OIL CORPORATION, TEXACO, INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION and GULF OIL CORPORATION,
Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES

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BRIEF OF DEFENDANTS-APPELLEES

ISSUE PRESENTED FOR REVIEW

The issue raised by this appeal is whether the District Court correctly dismissed, on the basis of the act of state doctrine, the Third Antitrust Claim of the complaint which seeks to recover treble damages resulting

from the nationalization of plaintiffs' oil properties by the Libyan government.

STATEMENT OF THE CASE

Preliminary Statement

By this appeal, plaintiffs-appellants would have this Court overturn the decision of the District Court (Weinfeld, J.), dismissing the Third Claim of the complaint on the ground of the act of state doctrine. The dismissal was a straightforward application of the well-established rule that this nation's judiciary "will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). In the context of the Libyan acts involved in the Third Claim, the continuing vitality and applicability of the long-established act of state doctrine is unquestioned.

The District Court correctly held that the defendants' assertion of the act of state doctrine "rests on a solid foundation"; that the alleged manipulative course of conduct attributed to defendants "centers about negotiations and dealings with, and action thereafter taken by, the Libyan government"; and that resolution of the Third Claim "clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiffs' as well as other oil producers' properties and the underlying reasons for the Libyan government's actions." (JA 97-100).

It is quite apparent, moreover, that plaintiffs are aware of the doctrine's modern applicability in the context of the Third Claim. The tone and approach of their brief highlight their desperation in prosecuting this appeal from Judge Weinfeld's well-reasoned dismissal of that claim. Plaintiffs' ever-recurring inflammatory references to immaterial matters not of record and their

indiscriminate and irrelevant accusations leveled against defendants' business activities abroad, which admittedly are not alleged in this case, speak louder than anything defendants might say about the weakness of plaintiffs' arguments on the merits.

The Nature of the Case and the Proceeding Below

The amended complaint purports to allege violations of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 73 of the Wilson Tariff Act (15 U.S.C. § 8), as well as a breach of a written contract known as the Libyan Producers' Agreement (the "Agreement"). Plaintiff Nelson Bunker Hunt and each of the defendants are signatories to the Agreement and to supplemental agreements and amendments thereto, all of which are attached as Exhibits A through E to the amended complaint[1] (JA 9-10, 19-26, 38-58).[2]

The complaint sets forth three antitrust claims and a breach of contract claim. The third antitrust claim at issue here charges that Hunt suffered injury by reason of the nationalization of his crude oil producing properties in Libya. The defendants, it is charged, manipulated the course of Libyan negotiations and followed a course of action that led to Hunt's nationalization.

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[1] The original complaint filed March 7, 1975, named Nelson Bunker Hunt as the only plaintiff. While the parties have stipulated that the complaint could be amended to add Herbert and Lamar Hunt as plaintiffs, these brothers are not signatories to the Libyan Producers' Agreement and have no rights under it. Though referring in this brief to "plaintiffs" or to "Hunt" as meaning the plaintiffs collectively, defendants do not in any way waive their contention that Hunt's brothers have no rights under the Libyan Producers' Agreement.

[2] Throughout this brief, "JA" refers to the Joint Appendix. References in the brief to matters contained in the record on appeal but not reproduced in the Joint Appendix are cited to the "Record" or "Supplemental Record" together with the document number and, where appropriate, the page number thereof.

Defendants have filed answers denying the allegations of the amended complaint, asserting various affirmative defenses and, in a number of instances, asserting counterclaims based upon breach of contract, fraudulent conduct and other wrongs resulting from plaintiffs' conduct in connection with the Agreement. (Supplemental Record at 147, 148, 149, 150, 151, 152, 153, 158 and 161).

Defendants moved in the District Court to dismiss the three antitrust claims by reason of the act of state doctrine and for other reasons and to stay the Fourth Claim pending arbitration of the dispute in accordance with the provisions of the Libyan Producers' Agreement. By its decision of November 5, 1975, the District Court dismissed Hunt's Third Claim pursuant to the act of state doctrine, but denied the motion to dismiss the First and Second Claims. In dismissing the Third Claim, the District Court did not reach defendants' contentions, among others, that Hunt was not within the "target area" of defendants' alleged conduct and that the activities alleged are not the type of conduct traditionally cognizable by our antitrust laws. (Record at 35; Supplemental Record at 131).

Thereafter, the District Court granted Hunt's motion for a final judgment dismissing the Third Claim as to all defendants pursuant to Rule 54(b), F.R.C.P., thus permitting this interlocutory appeal, but later denied defendants' motion pursuant to 28 U.S.C. § 1292(b), requesting certification for an interlocutory appeal from the Court's refusal to dismiss the first two antitrust claims. The § 1292(b) certification was sought so that this Court could, in its discretion, review the District Court's decision with respect to all three antitrust claims and, in particular, the applicability of the act of state doctrine to the First and Second Claims as well. (Supplemental Record at 141 and 156).

Statement of the Facts

In September 1969, Colonel Moamer Qaddafi took power in Libya under a new government known as the Revolutionary Command Council ("RCC"). It was the oft-stated intent of the new Libyan government to increase both the price of Libyan crude oil and Libya's share of such price (the "government's take"), as well as to increase Libya's control over production and the government's equity participation in the country's oil reserves and production facilities. The Libyan government thereafter made continual demands upon individual Libyan oil producers, particularly Hunt, relating first to price and government take, and then to control of production and equity participation. These demands were often accompanied by threats of cutbacks in production, embargoes and nationalization. In 1970, agreements were reached with all Libyan producers increasing prices and tax rates (JA 17).

These Libyan agreements prompted similar demands by the Organization of Petroleum Exporting Countries ("OPEC") and OPEC's Persian Gulf member states. OPEC's demands were officially formulated in a series of resolutions promulgated in Caracas, Venezuela, on December 9-12, 1970. Negotiations between the Persian Gulf countries and oil companies in the Gulf area to implement the new demands were scheduled for Teheran in January of 1971 (JA 17-18).

On January 3, and again on January 9, 1971, before the scheduled January OPEC meeting and despite its own recently concluded agreements with the oil producers, Libya demanded new increases in "government take," as well as a required "reinvestment" in Libya by the oil producers at the rate of 25 cents per barrel. The Libyan government moved first against Hunt and defendant Occidental, giving each until January 16, 1971, to accept its allegedly "non-negotiable" demands (JA 18).

This series of government actions by Libya and other oil producing countries raised serious questions for petroleum consuming countries and for crude oil producers such as Hunt and defendants. The stability and availability of crude oil supplies at a reasonable cost were threatened, as were existing contractual arrangements under which the crude was purchased. The governments of these crude oil exporting countries, particularly Libya, were making unilateral demands for changes in the previously agreed-upon supply arrangements, and there was concerted action by the various governments in support of those demands. These governmental actions by the oil exporting countries were recognized by the governments of the United States and other petroleum consuming nations as a threat to their mutual security (JA 39).

In these circumstances, the individual crude oil producers in Libya found themselves unable to conduct meaningful negotiations with the Libyan government or other oil producing countries. They decided, therefore, to endeavor to present a united front in dealing with the actions and demands of the oil producing countries, including Libya. This decision was reflected in and implemented by a joint Message to OPEC and by a "sharing arrangement," known as the Libyan Producers' Agreement dated January 15, 1971. These joint efforts were undertaken with the knowledge and approval of the Departments of State and Justice. The Libyan Producers' Agreement was subsequently supplemented and amended on October 18, 1971, December 16, 1971 and November 21, 1972 (JA 19, 38-58).

Each party to the Agreement, including plaintiff Nelson Bunker Hunt, recognized and affirmed "that it is entering this agreement of its own free will and pursuant to its own individual judgment as to its own best interests." Each of the producers recognized "that if it

should stand firm in refusing the demands of the Libyan Government, it might suffer serious financial consequences which would *not* be fully alleviated by the limited mutual self-help provisions of this agreement" (emphasis added). Each party signatory, however, agreed "that in view of the substantial benefits expected to be derived by it from this agreement, it is prepared to participate herein" (JA 39).

In general, the Agreement provided that if one producer's crude oil production in Libya was cut back as a result of Libyan government action, all other producers would share in that cutback on the proportionate basis provided for in the Agreement. If during such sharing program there was insufficient Libyan oil because of Libyan government restrictions, the producers with Persian Gulf crude production would supply the cut back Libyan producers (who had no Gulf production, such as Hunt) with Persian Gulf oil *at cost* to enable them to meet their commitments to pre-existing European and Western Hemisphere customers. This obligation to provide Persian Gulf oil, however, could also be satisfied by the exercise of an option to pay cash in lieu of oil at the rate of 10 cents per barrel.[1] The Supplement to the Agreement, dated November 21, 1972, reaffirmed that option and also raised the rate to 15 cents per barrel effective January 1, 1974 (JA 40-42, 56-58).

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[1] It was "expressly understood that the exercise of such option shall give rise to no claim other than that for payment of the amounts due under paragraph 4(a) . . ." [*i.e.*, the 10¢ per barrel option provision] (JA 42).

The parties acknowledged in the Agreement that it was their "present intention" to supply crude rather than exercise the cash option; but this statement of "present intention" in no way modified or limited a party's legal right to exercise the option provided for in paragraph 4(a) of the Agreement (JA 42).

While the producers declared it to be their intention not to make any agreement or offer of agreement with the Libyan government with respect to "government take" of crude oil without the assent of the other parties, and to endeavor to include a requirement that the government deal with the other producers on comparable terms, these declared intentions were subject to the proviso that "nothing contained in this paragraph 1 [of the Agreement] shall obligate any company to take or refrain from taking any action if to do so would, in its opinion, be contrary to its vital interests." This provision protecting each producer's vital interests was also reaffirmed in the Supplement to the Agreement, dated November 21, 1972 (JA 39 and 57).

By its terms, the Agreement became effective only upon receipt of advice that the U.S. Department of State interposed no objection to the Agreement and expressed its support thereof, and that the Department of Justice stated in writing that it had no present intention of instituting any proceeding under the antitrust laws with respect to the making or performance of the Agreement. Moreover, the U.S. companies agreed to make such reports concerning the Agreement as the Attorney General or the Secretary of State may request (JA 43-44).

The Agreement was amended or supplemented three different times during 1971 and 1972. Each time the Agreement and proposed modification were submitted to the Antitrust Division and each time the Department of Justice reaffirmed its blessing. Hunt agreed to each of these amendments and supplements (JA 46-58).

Hunt has conceded that:

> The parties intended this contract to serve as a means of insuring a stable oil supply at reasonable cost from their respective Libyan and Persian Gulf holdings; this stability being threatened by changes

> in the policy and attitudes of the Libyan government. The importance and magnitude of this agreement is evidenced by the concern and approval given it by the United States Department of State and Department of Justice. (*Nelson Bunker Hunt* v. *Mobil Oil Corporation*, Civil Action No. 234-74-A, filed April 26, 1974, E.D. Va.) (Supplemental Record at 132, p. 40).[1]

Indeed, Hunt has benefitted from the provisions of the Agreement far more than any other party. He has received some 49 million barrels of crude oil, at cost, and considerable cash from the other producers pursuant to the terms of the very Agreement which he now disowns (JA 27).[2]

Plaintiffs' statement of the case is noteworthy for its omissions of pertinent facts. It fails to recognize that the Libyan Producers' Agreement was a limited, mutual insurance pact designed to protect against some but not all risks; that the replacement or backup oil (or cash in

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[1] "Prior pleadings may constitute competent admissions, even though made in another proceeding." *Douds* v. *Seafarers' Int'l Union*, 148 F. Supp. 953, 956 (E.D.N.Y. 1957) (citations omitted); *see also*, *Rogers* v. *Edward L. Burton & Co.*, 137 F.2d 284, 286 (10th Cir. 1943).

[2] This is not Hunt's first action brought in connection with the Agreement. On April 26, 1974, he filed a complaint in the Eastern District of Virginia, naming Mobil Oil Corporation a defendant, and thirteen other parties to the Agreement as co-conspirators. That complaint, as here, alleged both breach of contract and antitrust violations. The record herein contains a list of the docket entries and the complaint in that action. (Supplemental Record at 132, pp. 37-57).

In that action, plaintiff's counsel sought extensions of time to respond to discovery, sought to postpone the deposition of plaintiff Hunt and advised the Court that Hunt intended to file an amended complaint naming the other parties to the Agreement as defendants. Faced with accelerated discovery rulings by the court resulting from the failure to pursue his claims, plaintiff requested and was granted a voluntary dismissal. (Supplemental Record at 132, p. 38).

lieu thereof) was to be provided by the Persian Gulf producers *at cost* in order to assist Libyan producers such as Hunt to remain in business; that the pre-existing customer provision was not part of a normal sale in commerce but simply a measure of the extent to which the burdens of cutbacks in Libyan production were to be shared by other producers either by supplying crude oil at cost or by cash; and that the "vital interests" provision in paragraph 1 of the Agreement permitted Hunt or any other party to accept Libyan participation or take any other action it deemed to be in its vital interests notwithstanding the other terms of the Agreement.[1] (JA 39).

Matters of Special Pertinence to the Third Claim

The Third Claim, as noted above, is addressed to plaintiffs' injuries arising from acts of the Libyan government.

There is no dispute between the parties to this lawsuit that in late 1970 the producing companies, including Hunt, were faced with increasingly hostile acts and demands by the Libyan government and that some form of united front and cooperative effort on behalf of the producing companies was essential. The unfortunate fact is, however, that the collective efforts of the oil companies—including Hunt—did not succeed, with the result that all of the producing companies in Libya—not just Hunt—were nationalized either entirely or partially and thus suffered as a result of the acts and demands of the Libyan government.

But only Hunt has sought to charge those who were willing to help him at the time—and did indeed help him to the extent of some 49 million barrels of oil plus cash—

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[1] Under paragraph 5 of the Agreement, a party making an offer of agreement or an agreement with the Libyan government of the kind described in paragraph 1 of the Agreement without the assent of the other parties ceased to be entitled to the benefits but continued to be subject to the obligations under the Agreement (JA 42).

with a nefarious scheme allegedly hatched many years before to bring about his nationalization by Libya. Under the Third Claim, Hunt seeks from other parties to the Libyan Producers' Agreement damages directly resulting from Libya's unilateral acts of a political or sovereign nature.

Most of the charges in plaintiffs' statement of the case relate, if at all, to the First and Second Claims rather than the Third Claim which is at issue on this appeal. With regard to the Third Claim, the most glaring omission in plaintiffs' appeal brief is their failure to recognize and give credence to those admissions in the complaint dealing with the actions of Libya and other producing countries and the efforts by the defendants in dealing with and reacting to those actions.

But the allegations of the compluint, as well as plaintiffs' appeal brief, do amply demonstrate that judicial resolution of the Third Claim would necessarily require examination of the acts and conduct of the Libyan government and its officials as well as the motivations for their actions.

Plaintiffs charge that they were induced by the defendants to negotiate and deal *with the Libyan government* in ways which were detrimental to plaintiffs. However, whether induced or not, the complaint concedes that Hunt's production was cut back *by Libya* because he refused to market British Petroleum's oil (which had been nationalized by Libya in December 1971), that later Hunt's right to produce and export oil was terminated *by Libya* because of his refusal to accede to Libya's participation demands, and finally that his oil concession and other assets in Libya were nationalized *by the government* (JA 17-19, 22-27, 33-34).

Thus, the acts of the Libyan government inextricably involved in the Third Claim include government-mandated production cutbacks, participation, expropria-

tion and nationalization of the producing companies' interests in that country, including the interests of Hunt. Any damages suffered by Hunt by reason of the nationalization of his Libyan properties as alleged in the Third Claim were plainly the result of actions by the Libyan government—not defendants.

SUMMARY OF ARGUMENT

1. The basic allegations in the Third Claim—that Hunt's nationalization resulted from defendants' manipulation of the course of Libyan negotiations and actions of the defendants in dealing with the Libyan government—present a classic case for the application of the act of state doctrine. Commencing with the Supreme Court's decision in *Underhill* v. *Hernandez*, *supra*, over 75 years ago that the "courts of one country will not sit in judgment on the acts of the government of another done within its own territory" (168 U.S. at 252), our courts have consistently held that the act of state doctrine is a bar to claims of the type asserted in the Third Claim.

In other antitrust cases involving factual settings strikingly similar to that presented here, the act of state doctrine has been reaffirmed and applied. *See American Banana Company* v. *United Fruit Company*, 213 U.S. 347 (1909) and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Calif. 1971), *affirmed per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

The District Court correctly analyzed the allegations in the Third Claim and concluded that the "claimed consequences of defendants' manipulative course of action all involve acts of the Libyan government which appear to be within the proscription of the act of state doctrine" (JA 98). It is precisely in such a case that the act of state doctrine precludes judicial examination of the public or political acts of a foreign state within its own territory.

It is not credible for plaintiffs to assert that they challenge no act by the Libyan government and do not ask this Court to inquire into the acts of a foreign state, when the *only injury* to plaintiffs alleged in the Third Claim is that directly resulting from the nationalization of their properties by Libya and their consequent elimination as a Libyan oil producer. Therefore, by now contending that they do not complain about the nationalization of their Libyan properties (but complain only about acts of defendants prior to such nationalization), plaintiffs have effectively confessed that the Third Claim does not state a cause of action.

As the District Court further held, the cases relied upon by plaintiffs—*Sisal Sales* and *Continental Ore* [1]—are not in point (JA 101-102). In *Sisal Sales*, the issue was one of jurisdiction, not the application of the act of state doctrine. And likewise, *Continental Ore* did not turn on the act of state issue because the actions complained of were not acts of the Canadian government.

2. There is no merit to plaintiffs' argument that there is a doctrinal trend to narrow the scope of the act of state doctrine in cases such as the instant matter. Where the actions which are the direct cause of plaintiffs' alleged injury are public or political acts of a foreign state within its own territory, the doctrine retains its full vitality.

None of the cases relied upon by plaintiff—*Sabbatino*, *First National City Bank* or *Dunhill* [2]—constitutes any

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[1] *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

[2] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); and *Mendenez* v. *Saks and Company*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom., Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 416 U.S. 981 (1974); reargument ordered, 422 U.S. 1005 (1975).

precedent for applying in this case plaintiffs' asserted new limitation upon the act of state rule. None of the above cases is an antitrust action or involves claims for damages directly resulting from the nationalization decrees of a foreign state acting in its sovereign or public capacity. Rather, in each case the foreign state (Cuba) sought either to enforce or defend its right to title to expropriated property or to repudiate a commercial obligation under the pretext of the exercise of a sovereign act of state.

In both *Sabbatino* and *First National City Bank*, the Supreme Court reaffirmed the viability of the act of state doctrine. And in the *Dunhill* case, the Solicitor General also reaffirms the act of state doctrine in situations such as this case, and only suggests, as *amicus curiae*, that the act of state doctrine should not be a bar where a sovereign state seeks to invoke the rule to protect its repudiation of a commercial obligation, that is, when the sovereign is acting in its commercial capacity rather than its public or sovereign capacity. The State Department letter attached to plaintiffs' brief was submitted to the Solicitor General in the context of the *Dunhill* case involving Cuba's commercial, not public, acts.

3. Faced with judicial authorities reaffirming the viability and applicability of the act of state doctrine in situations strikingly similar to that present in Hunt's Third Claim, and apparently unconvinced even by his own version of a new doctrinal trend which, if it exists, has no precedential value here, Hunt resorts to the proposition that recent disclosures of dealings by multinational corporations with foreign governments, including alleged payments to and the purchase of services of key foreign officials, require this Court to reverse the District Court's dismissal of the Third Claim. This should be done, it is argued, even though plaintiffs expressly conceded below that there are no allegations in the complaint

of any such payments to foreign governments or of the purchase of services of key foreign officials.

Such inflammatory charges having no support in the complaint or record here and having no relevance to the issue before this Court should be disregarded and rejected for what they are—a desperate attempt by Hunt to overturn the dismissal of his Third Claim notwithstanding the fact that controlling legal principles and case law require affirmance. In deciding the issue framed by this interlocutory appeal this Court, we submit, should not render an advisory opinion or rewrite the act of state doctrine on the basis of matters neither before it nor having any relevance to the issue to be decided.

4. Apart from the merits of plaintiffs' appeal, this Court may also wish to consider whether the District Court's Rule 54(b) certification should be vacated as having been improperly granted. The factors relied upon by the Court in granting certification do not demonstrate that the plaintiffs in this case would have suffered substantial hardship or unfairness if an immediate interlocutory appeal had been denied. On the contrary, as a result of the granting of this interlocutory appeal, the application of the act of state doctrine may well have to be reviewed a second time by this Court in this same case. This case, we submit, was not the "infrequent harsh case" warranting departure from the well-grounded federal policy against piecemeal review.

ARGUMENT

I.

THE ACT OF STATE DOCTRINE IS A VIABLE AND CONTROLLING PRINCIPLE WHICH BARS HUNT'S THIRD CLAIM

A. Judicial Precedents Applying The Act of State Doctrine, Including Antitrust Cases With Similar Facts, Are Dispositive of the Issue Here

For more than seventy-five years the act of state doctrine has led the United States judiciary to refrain from passing upon public or sovereign acts of foreign governments committed within their own territory.

Justice Harlan, writing for eight members of the Court in *Banco Nacionale de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964), reviewed the "classic American statement of the act of state doctrine" as set forth in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In *Underhill*, a unanimous Court for this judicial circuit, 65 F. 577 (2d Cir. 1895), stated:

> Considerations of comity, and of the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. . . . *It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states* (65 F. at 579; emphasis added).

The Supreme Court affirmed:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the

> courts of one country will not sit in judgment on the acts of the government of another done within its own territory (168 U.S. at 252).

The *Sabbatino* decision stressed the dangers inherent in an American court reviewing the acts of a foreign sovereign. An examination of a foreign government's expropriation within its own territorial borders would "often be likely to give offense to the expropriating country" (376 U.S. at 432).

When measured against the act of state doctrine, Hunt's Third Claim was correctly dismissed by the District Court. In concluding "that defendants' 'act of state' plea rests on a solid foundation" (JA 97), the District Court explained:

> The manipulative course of conduct attributed to the seven majors following the signing of the Libyan Producers' Agreement centers about negotiations and dealings with, and action thereafter taken by, the Libyan government.
>
> * * * *
>
> *The aforesaid claimed consequences of defendants' manipulative course of action all involve acts of the Libyan government which appear to be within the proscription of the act of state doctrine* (JA 97-98; emphasis added).

And, further:

> To establish his claim plaintiff would have to show that such acts and conduct were a material cause of his alleged damage; that but for defendants' conspiratorial manipulative activities the Libyan government would not have cut back his production, shut off his oil supply completely and then nationalized his properties. *This clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and*

the underlying reasons for the Libyan government's actions (JA 99-100; emphasis added).

As noted above, Hunt's own allegations demonstrate that it was the political or public acts of the Libyan government in cutting back his production and finally nationalizing his concession which directly caused the injury alleged in the Third Claim.[1] Ignored, for the purposes of this appeal, are the allegations in the Third Claim that defendants "followed a course of action that led to Hunt's nationalization and elimination from the production of Libyan crude oil" (JA 33). Plaintiffs' assertion at page 15 of their appeal brief that the Third Claim "complains of no act by the government or by any official" simply cannot be squared with the allegations in the complaint or serve to amend the complaint.

Of particular importance here, the courts have long held that in antitrust cases the act of state doctrine operates to bar judicial examination of actions of a foreign government, including in particular acts of nationalization of property. This is so even when the governmental acts are alleged to have been induced or procured by private parties.

This principle was early enunciated by the Supreme Court in a factual setting similar to that which Hunt alleges here. In *American Banana Co.* v. *United Fruit Co.*, 160 F. 184 (C.C.S.D.N.Y.), *affirmed*, 166 F. 261

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[1] Hunt does not contest that the Libyan seizure of his properties was an international political act directed at American policy and interests generally in that area. Upon confiscation of Hunt's holding in Libya on June 11, 1973, Colonel Qaddafi stated that "we proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold, insolent face. . . . The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost. . . ." Statement of the State Department in the Hearings Before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-317 (1974).

(2d Cir. 1908), *affirmed*, 213 U.S. 347 (1909), plaintiff sued under the Sherman Act for the destruction of its banana business in Costa Rica. American Banana's complaint alleged that United Fruit had instigated and induced the Costa Rican government to confiscate its banana plantation. The trial court dismissed the complaint, stating:

> It is impossible to adjudicate this matter without sitting in judgment on the right of Costa Rica to do what was done . . . and this court has no power to sit in judgment on the validity or legality of the act of any sovereign independent nation (160 F. at 188).

On appeal to this Court, American Banana pressed the view that the Government of Costa Rica was not before the court and, therefore, the trial court should proceed. This Court rejected that distinction:

> Now the only theory upon which the plaintiff can be awarded damages against the defendant is that it is responsible for the unlawful acts instigated by it. . . . Consequently this court is called upon to investigate the lawfulness of acts done under the authority of a foreign independent state. But this court cannot undertake any such investigation. The acts complained of were adopted by the government of a sovereign state in its political capacity and in the exercise of its de facto sovereignty. The question of their legality or illegality cannot be determined by the courts of another country.
>
> * * * *
>
> *Upon principle and authority, it follows that Costa Rica is entitled to immunity from any investigation of its sovereign acts by this court.* The plaintiff, however, asserts that this immunity is only an immunity from suit which has no bearing upon the defendant's liability. But, as we have seen, the immunity is far broader than this. The validity of an act adopted by a sovereign state cannot be inquired

> into at all—*directly or collaterally*—by the courts of another state (166 F. at 265 and 266; emphasis added).

The Supreme Court affirmed, stating "a seizure by a state is not a thing that can be complained of elsewhere in the courts" (213 U.S. at 357-358). Here, plaintiffs' Third Claim seeks loss of profits from the nationalization of their Libyan concession (Brief of Appellants at 27). But the Supreme Court in *American Banana* specifically held:

> The injuries to the [plaintiff's] plantation and supplies seem to have been the direct effect of the acts of the Costa Rican government, which is holding them under an adverse claim of right. *The claim for them must fall with the claim for being deprived of the use and profits of the place* (*Id.* at 359; emphasis added).

The *American Banana* case continues to be a viable and controlling precedent for the application of the act of state doctrine in antitrust cases where the complaint requires inquiry into the acts of a foreign government.[1] The District Court below took particular note of the fact that "Here [*i.e.*, Hunt's Third Claim] the operative facts are even more strikingly similar to *American Banana* than they were in *Occidental*, since the foreign act of state complained of in *American Banana* was the na-

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[1] Plaintiffs seek to avoid *American Banana* as a clear and viable precedent for the act of state doctrine by focusing only on the jurisdictional issue also raised in that case. On this latter issue, *American Banana* held that a Sherman Act action could not be maintained in the United States for acts committed outside the United States. That portion of the opinion has been modified to the extent that jurisdiction is now held to exist where there is an adverse effect on the interstate or foreign commerce of the United States. Thus, subsequent criticism of the *American Banana* decision has been limited to that portion of the holding that found acts committed outside the United States not subject to an action within the United States even though they affected trade or commerce with the United States. *See, e.g., United States* v. *Aluminum Co. of America, Inc.*, 148 F.2d 416 (2d Cir. 1945).

tionalization of plaintiff's production facilities" (JA 101).

Again, in another antitrust action substantially similar to this case, *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir., 1972), *cert. denied*, 409 U.S. 950 (1972), the act of state doctrine was held to bar "a claim for antitrust injury . . . from foreign sovereign acts," even though allegedly induced and procured by the defendant. (331 F. Supp. at 110.) In *Occidental Petroleum* plaintiffs charged defendants with a conspiracy in restraint of trade with respect to "the exploration, development and exploitation of petroleum reserves of the territorial waters of the Trucial States" (*Id.* at 95). The implementation of the alleged conspiracy was said to involve the fraudulent inducement of action by sheikdoms in the Persian Gulf to deprive plaintiffs of their oil concession. In granting defendants' motion to dismiss, the court held that "the act of state doctrine is the relevant and dispositive principle on this motion to dismiss" (*Id.* at 108). Even where the action of the foreign sovereign is "induced and procured by the defendant," (*Id.* at 110) no antitrust suit may be maintained to recover therefor if the injury flows from a foreign government's act:

> Because a private antitrust claim requires proof of damage resulting from forbidden conduct, . . . [citations], plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. (*Id.* at 110).[1]

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[1] The court's opinion in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co., supra,* noted that the significance of the *American Banana* case has been "somewhat obscured" by the fact that the opinion "expounds at some length a restrictive view of Sherman Act jurisdiction, based upon the situs of primary conduct." (331 F. Supp. at 109). Noting that this portion of the opinion has

The District Court here, in discussing the applicability of the act of state doctrine to Hunt's Third Claim, expressly noted that the court in *Occidental* "specifically considered the contention, heavily relied upon by Hunt here, that the doctrine was inapplicable because plaintiffs were not complaining of the acts of foreign states set forth in the complaint, but rather only of the defendants' conduct in 'catalyzing those acts'" (JA 100-101).

Without any supporting authority, Hunt incorrectly argues that "there is no rule that a court may not inquire into what a government did, why it did it, and even whether its action was lawful." (Brief for Appellants at 24). This argument flies directly in the face of the act of state doctrine. Under this rule, as shown above, the courts have long held that public or political actions of a foreign government cannot be reviewed and examined in suits brought under the antitrust laws.

B. The Direct and Immediate Cause of Hunt's Injury Were Actions of the Libyan Government in Respect of Which Judicial Inquiry is Precluded by the Act of State Doctrine

There can be no dispute whatever that the direct and immediate cause of Hunt's injury alleged in the Third Claim were the actions of the Libyan government. The complaint alleges that beginning in September 1969, the Libyan government threatened to increase the price of Libyan oil and to increase its control over production

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been distinguished by the Supreme Court in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the District Court in *Occidental* observed that as even those cases intimate (274 U.S. at 276; 370 U.S. at 706-707), the established law is that "the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." (331 F. Supp. at 109-10 n. 28 and 110).

and its equity participation, and that these demands were accompanied by threats of cutbacks in production, embargoes and nationalization (Para. 17); that Libya moved first against Hunt (Para. 19); that on December 7, 1971, Libya nationalized BP's one-half share of the Hunt concession and demanded that Hunt market BP's oil for Libya's account (Para. 32); that Hunt refused to market BP's oil for Libya's account, and as a result his personnel were evicted from the Sarir Field and his production was cut back (Para. 34); that on December 11, 1972, as a result of his refusal to market BP oil and accept the equity participation demands of the Libyan government, the Libyan government refused to permit further export of his oil (Para. 40); that on May 24, 1973, Libya terminated Hunt's right to produce and export crude oil; and finally that on June 11, 1973, all of his assets were formally nationalized (Para. 41) (JA 16-18, 22-26).

Notwithstanding these allegations in the complaint that the alleged injury was caused by acts of Libya, Hunt now contends that the wrong done to him was caused by conduct of defendants prior to any act of the Libyan government, that he does not challenge or complain about any actions of that government or of any Libyan official and that the alleged wrongdoing is the tortious conduct of the defendants and not of the Libyan government.

It is, of course, beyond belief that Hunt had no quarrel with the Libyan government, which seized his oil concession and other assets in Libya. It is, indeed, not credible for Hunt to assert that he challenges no act by the Libyan government and does not ask the court to inquire into the acts and conduct of a foreign state.

The District Court found Hunt's argument unconvincing. In rejecting his contention that the court need only look at the defendants' actions, the District Court

held that ". . . the matter does not end there" (JA 99). To establish his Third Claim, the Court explained, Hunt must prove that but for defendants' alleged manipulative activities the Libyan government would not have cut back his production, shut off his oil supply completely and then nationalized his properties. (JA 99). To do this, the District Court said, "*clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions*" (Emphasis added; JA 98-100). And it is precisely such judicial inquiry into official actions of a foreign government that is barred by the act of state doctrine.

Hunt's argument that he complains of no action by the Libyan government but only of defendants' alleged conduct renders his Third Claim legally defective under the antitrust laws because *the only injury to Hunt's business or property alleged in the Third Claim is that said to have resulted from the nationalization of his concession in Libya* (JA 33 and 34). It is an elementary antitrust principle that to state a cause of action under the Clayton Act[1] for treble damages for violation of the antitrust laws, a plaintiff must allege not only a violation of the antitrust laws but must also allege injury to his business or property directly flowing from such violation. *See, e.g., Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970) *cert. denied*, 400 U.S. 1001 (1971); and *National Auto Brokers Corp.* v. *General Motors Corp.*, 60 F.R.D. 476, 490 (S.D.N.Y. 1973) ("In the case of a conspiracy claim, recovery is not based on the conspiracy

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[1] Section 4 of the Clayton Act (15 U.S.C. § 15) provides, in part:

> Any person who shall be *injured in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the *damages* by him sustained. . . . (Emphasis added)

itself but on injury to the plaintiff produced by specific overt acts pursuant to the conspiracy").

Allegations of an antitrust conspiracy without claim of injury or damage to one's property do not constitute an actionable wrong on which a private party may maintain a cause of action under the antitrust laws. The complaint must allege specific *conduct* of the defendant that purportedly violated the antitrust laws, and a description of how that conduct *damaged* the plaintiff.

This fundamental principle was stated by the court in *Winckler & Smith Citrus Products Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965) as follows:

> Since the statute [15 U.S.C. § 15 (1958)] which gives the private litigant the right to sue imposes the basic requirement that there be injury to the plaintiff's business or property, it has been held repeatedly that the gist of the action is legal injury —not mere violation of the statute. The damage for which recovery may be had in a civil action must be proximately related to the conspiracy; recovery for a statutory violation is not based on the conspiracy itself but on injury to the plaintiff produced by specific overt acts pursuant to the conspiracy. *The 'mere existence of a violation is not sufficient ipso facto to support the action' and a 'private person has no right to complain of a violation of § 1 or § 2 as such, nor does such violation per se give a private cause of action'.* (346 F.2d at 1014, n. 1; emphasis added; citation omitted).

See also, Sam S. Goldstein Industries, Inc. v. *Botany Industries, Inc.*, 301 F. Supp. 728, 735-36 (S.D.N.Y. 1969); *VTR, Incorporated* v. *Goodyear Tire & Rubber Co.*, 303 F. Supp. 773, 782-83 (S.D.N.Y. 1969); *National Research Bureau, Inc.* v. *Bartholomew*, 331 F. Supp. 1003, 1005 (W.D. Pa. 1971), *reversed on other grounds*, 482 F.2d 386 (3rd Cir. 1973) ("Absent damage a

private litigant has no cause of action under the antitrust laws").

C. The Case Authority Relied Upon By Hunt Is Inapposite to the Factual and Legal Issues Present Here

There is no substance to Hunt's argument that the cases he relies upon in this appeal, *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), have emasculated the act of state doctrine as held in *American Banana* to be applicable to antitrust cases.[1]

In *Sisal Sales* a world monopoly on sisal was achieved by a series of private actions in the United States and Mexico, some of which were aided by discriminatory Mexican legislation. The Supreme Court held that the course of conduct involved was illegal, carefully distinguishing it from *American Banana*:

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[1] The continued viability of the act of state doctrine is shown in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) where the Supreme Court held that antitrust damages could not be recovered for injury suffered as a result of the acts of government. The Court cited with approval its decision in *American Banana* and distinguished *Continental Ore* as not involving an act of a sovereign state. *See also Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) where the Court held that no violation of the Sherman Act can be based upon attempts to influence the passage or enforcement of laws.

Also, as noted above, the court in *Occidental Petroleum*, *supra*, expressly distinguished *Sisal Sales* and *Continental Ore* and stated that these two cases "intimate" and other cases clearly establish (citing *e.g.*, *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 288 (1952)) that the holding of *American Banana* that has endured is that "the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant" (331 F. Supp. at 109-110).

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws. (274 U.S. at 276)

Thus, in *Sisal Sales* the issue was one of jurisdiction. The act of state doctrine was not at issue, since the alleged injury was the direct result of defendants' conduct, not of the acts of a foreign government.

Similarly, *Continental Ore Co.* did not turn on an act of state issue. The defendants were accused of joint efforts to monopolize the vanadium market in the United States. Plaintiff charged that defendant Union Carbide had utilized its subsidiary (Electro Met of Canada), which had been appointed by the Canadian government as its exclusive vanadium purchasing agent, to further the alleged conspiracy and to destroy plaintiff's business by refusing to purchase from plaintiff. The actions complained of were performed at the direction of the parent company, not at the direction of the Canadian government.

The Supreme Court said:

> But there is no indication that the [Canadian] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. The exclusion, Continental claims, resulted from action of Electro Met of Canada [the purchasing agent], taken within the area of its discretionary powers granted by the

> Metals Controller and in concert with or under the direction of the respondents. . . . Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. (370 U.S. at 706-707)

Judge Weinfeld likewise found that these two decisions were not controlling on the act of state issue as applied to the Third Claim:

> In *Sisal*, the Court explicitly distinguished *American Banana* on the ground that the conspiracy in *Sisal* was 'made effective by acts done' within the United States and thus was not '[a] conspiracy in this country to do acts in another jurisdiction,' as was the case in *American Banana* and is the case presently before this court. In *Continental Ore*, the Court rested its decision on similar grounds, but also emphasized that no 'official within the structure of the Canadian Government' was involved (JA 101-102).

The fact is that Hunt's basic charge in the Third Claim rests upon the group efforts by the producing companies (including Hunt) in negotiating, petitioning and responding to the actions of Libya and other producing countries; the formulation and implementation of the Libyan Producers' Agreement to which plaintiff was a party and which was designed to assist the companies in establishing a united front in dealing with the Libyan government; and finally and most important, the acts of the Libyan government regarding production cutbacks, participation, expropriation and nationalization of the producing companies' interests in that country, including such acts directed at Hunt.

In short, the conduct of the defendants alleged in the Third Claim was directed toward political and governmental activities of precisely the type covered by the act of state doctrine.

II.

THE DOCTRINE THAT THIS NATION'S JUDICIARY WILL NOT SIT IN JUDGMENT ON THE SOVEREIGN, PUBLIC ACTS OF ANOTHER STATE IS A FUNDAMENTAL PRINCIPLE, THE VITALITY OF WHICH HAS NOT BEEN ERODED

Implicitly recognizing that the act of state doctrine sets up an absolute bar to the Third Claim of his complaint, Hunt seeks to avoid this result by contending that "if the 'act of state' doctrine as conventionally construed requires dismissal of Count 3," then this Court should reappraise that doctrine in light of purported "new doctrinal trends" (Brief for Appellants at 36).[1]

In support of these contentions Hunt cites the Supreme Court cases of *Sabbatino*[2] and *First National City Bank*,[3] and a case currently pending before the Supreme Court, *Alfred Dunhill*.[4] In addition, Hunt refers to the Tate Letter,[5] as well as the Solicitor Gen-

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[1] The District Court, it should be noted, found "an absence of new doctrinal trends" in this area of the law and observed that any "reassessment of the range of the doctrine must rest with that Court (*i.e.*, the Supreme Court) and not this court" (JA 102).

[2] *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. 398 (1964).

[3] *First National City Bank* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. 759 (1972).

[4] *Mendenez* v. *Saks and Company*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom.*, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 416 U.S. 981 (1974); reargument ordered, 422 U.S. 1005 (1975).

[5] The State Department on May 19, 1952, in a letter by Acting Legal Advisor Jack Tate, outlined the scope of sovereign immunity of foreign states, setting forth a procedure whereby the foreign

eral's brief and a State Department letter which were submitted *amici curiae* in the *Dunhill* case.

The suggestion that these cases and other extra-record materials establish a new doctrinal trend which all but does away with the act of state doctrine is pure wishful thinking. On the contrary, each case affirms unequivocally the continued vitality of the act of state doctrine in circumstances such as are present here. Moreover, each case turned on a question wholly unrelated to the present complaint which seeks antitrust damages from defendants for the nationalization by Libya of plaintiffs' concession.

As noted above, the Supreme Court in *Sabbatino* reaffirmed, without reservation, the continued viability of the act of state doctrine.[1] Likewise, *First National City Bank* is not part of any doctrinal trend to curtail the application of the act of state doctrine in the kind of case presented here.[2]

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government seeking immunity ordinarily requests a "suggestion of immunity" from the State Department. Dep't State Bull. 984 (1952).

[1] Referring to the "classic American statement of the act of state doctrine" (376 U.S. at 416), set forth in *Underhill* v. *Hernandez, supra,* the Court stated:

> None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill.* See *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347; *Oetjen* v. *Central Leather Co.,* 246 U.S. 297; *Ricaud* v. *American Metal Co.,* 246 U.S. 304; *Shapleigh* v. *Mier,* 299 U.S. 468; *United States* v. *Belmont,* 301 U.S. 324; *United States* v. *Pink,* 315 U.S. 203. On the contrary in two of these cases, *Oetjen* and *Ricaud,* the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms (376 U.S. at 416-417).

[2] The Court there again referred to the "classical American statement" of the act of state doctrine found in *Underhill* v. *Hernandez, supra,* and stated:

> "[B]oth the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among

Specifically, the issue in *Sabbatino* was whether the original owner or the taking government [Cuba] was entitled to recover the proceeds of expropriated property sold abroad.[1] Mr. Justice Harlan, writing for the Court, held that the act of state doctrine was applicable whether or not there was a violation of international law (376 U.S. at 428).

The issue in *First National City Bank* was not whether Cuba acquired valid title to the property expropriated as in *Sabbatino*, but whether its counterclaim would lie against funds in the United States to recover compensation for expropriated property[2] (406 U.S. at 760-762).

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nations and among the respective branches of the Federal Government. The history and the legal basis of the act of state doctrine are treated comprehensively in the Court's opinion in *Sabbatino, supra*. . . .

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The doctrine precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign state. (Emphasis added; 406 U.S. at 762-763).

[1] In *Sabbatino* an agency of the Government of Cuba brought suit to recover the proceeds from the sale of sugar manufactured by properties it had earlier expropriated without provision for compensation to the original owner. The affirmative defense to the action of the Cuban government agent was that it did not have good title because the taking of this property was without just compensation and therefore in violation of international law. The act of state doctrine was raised in opposition to that defense.

[2] In *First National City Bank*, collateral for a loan by City Bank to Cuba was sold by City Bank to cover a default. City Bank refused to pay over the amount remaining after the loan was satisfied on the ground that at least that amount was owing it as compensation for City Bank's property in Cuba which had been expropriated. Cuba then filed suit against City Bank to recover the excess collateral. City Bank asserted a counterclaim for the loss due to its expropriated property. Cuba interposed the act of state doctrine as a defense to the counterclaim.

The plurality opinion, for three members, took note of the State Department's express advice to the Court that "the act of state

At issue in the *Dunhill* litigation is the statement of Cuba's counsel at trial that his client would refuse to honor a quasi-contractual commercial obligation to make restitution to Dunhill and other importers. This repudiation is set up as an act of state precluding entry of judgment against Cuba.

Accordingly, the *Sabbatino*, *First National City Bank* and *Alfred Dunhill* cases bear no resemblance whatsoever to the instant case.[1] In each case, the foreign state, Cuba, sought either to enforce or defend its right to title to expropriated property (*Sabbatino* and *First National City*), or to repudiate a commercial obligation under the guise of the exercise of a sovereign act of state (*Alfred Dunhill*).

Here, Hunt has *not* brought suit to reclaim, as the original owner, property or proceeds from the sale of property expropriated by the Libyan government;[2] or

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doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases" (406 U.S. at 764). Accordingly, despite the belief of six members of the Court to the effect that the views of the State Department are not determinative (*see* Brennan, J., dissenting, 406 U.S. at 790), the act of state doctrine was held not to prohibit consideration of the counterclaim.

[1] In the briefs and oral argument on the motion to dismiss in our case, none of these cases was even cited or discussed by Hunt as being relevant to or dispositive of the issues presented. Indeed, during the hearing on plaintiffs' request for a Rule 54(b) certification, Hunt's counsel specifically stated that *Sabbatino* and *Alfred Dunhill* had nothing to do with our case (Record at 117, p. 40).

[2] The Hickenlooper Amendment to the Foreign Assistance Act of 1961, 78 Stat. 1013, as amended, 22 U.S.C. § 2370(e)(2), passed with the intention of reversing the specific holding in the *Sabbatino* case, grants certain rights to the original owner, or one claiming through the original owner, of expropriated property to bring suit to reclaim such property if it was seized illegally under principles of international law. Thus, Hunt could bring "hot oil" suits (and in fact has done so) against a transferee of his oil and claim

filed suit against the Libyan government on a commercial obligation repudiated by that sovereign state. Rather, the conduct attributed to the defendants in Hunt's Third Claim *is bottomed entirely on negotiations and dealings with, and actions thereafter taken by, the Libyan government in its sovereign capacity.* All of Hunt's damages alleged therein—the cutbacks and ultimate nationalization of his assets—involve acts of the Libyan government within the act of state doctrine.

The confusion engendered by Hunt's misplaced reliance upon the above-described cases as evidence of a doctrinal trend is further compounded by his reference to the Tate Letter and the Solicitor General's brief and a State Department letter filed *amici curiae* in *Alfred Dunhill.*

The background and purpose of the Tate Letter were discussed by this Court in its decision in *Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354 (2d Cir. 1964). There, this Court traced the history of the application of the doctrine of sovereign immunity where the foreign government is acting in a commercial capacity. It was in this context that the Tate Letter of 1952, upon which Hunt now relies, was discussed (336 F.2d at 357-362). This Court then held that the act of state doctrine did not protect the government of Spain from liability when it was acting in a private or commercial capacity (*Id.* at 362-363). In so doing, it elaborated upon this doctrine by listing five categories of "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "*legislative acts, such as nationalization.*" (*Id.* at 360; emphasis added). In short, nationalization was specifically categorized as an act traditionally sensitive to foreign governments because of its political or public nature, and, therefore, subject to the act of state doctrine.

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that he was the owner of right because the Government of Libya did not have valid title, or had taken the property without just compensation.

Finally, as to the *amicus curiae* brief and attached State Department letter filed in the *Dunhill* litigation, both are inapposite to the issue here. The Solicitor General's brief, of course, is directed solely to the *Dunhill* case, which as demonstrated above is dissimilar to the instant case in that it involves the effect to be given to a repudiation of a commercial obligation by a foreign State. This is, therefore, the sole issue addressed in the Solicitor General's brief:

> In this brief, we discuss only the legal effect that must be given to such a repudiation by a state or federal government. (Brief for United States as Amicus Curiae at 13).

In addition, contrary to Hunt's representation, the Solicitor General is *not* "strongly urging further cutbacks in the 'act of state' doctrine" (Brief for Appellants at 38). On the contrary, the viability of the doctrine is reaffirmed throughout the government's brief.

> [*T*]*he United States has supported the judicial application of the act of state doctrine.* A principal concern underlying that doctrine is that judicial review of a foreign state's public acts might interfere with or embarrass the conduct of foreign relations by the Executive. *Both the doctrine of foreign sovereign immunity and the act of state doctrine implicate important foreign policy interests of the United States.* (Emphasis added; *Id.* at 2).[1]

However, based on the facts of the *Dunhill* case, the Solicitor General concludes:

> The judicial concerns that have given rise to the act of state doctrine would not be implicated by a refusal to give legal effect to *respondent's* [*Cuba's*]

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[1] The Solicitor General's brief expressly states that traditionally the act of state doctrine applies where there is an "implementation" [*e.g.*, nationalization] by a foreign state, citing *American Banana* (Brief at p. 32).

repudiation of their commercial obligation in this case (Emphasis added; *Id.* at 15).

Similarly, the State Department letter appended to Hunt's brief and attached to the Solicitor General's brief in the *Dunhill* case is not pertinent here. In light of the circumstances of *Dunhill*, the letter can only be interpreted as suggesting that sovereign immunity and the act of state doctrine should not afford protection to a foreign state's repudiation of its commercial liabilities.

In the final analysis, struggle as he may, Hunt cannot wish away the continued vitality of the act of state doctrine. There simply is no merit to his argument that there is a doctrinal trend to narrow the scope of the act of state doctrine as applied in cases such as the instant matter. Where the actions which are the direct cause of Hunt's alleged injury are public or political acts of the Libyan government done within its own territory, the doctrine sets up an absolute bar to the Third Claim.

III.

HUNT'S REPEATED REFERENCES TO AND RELIANCE UPON IRRELEVANT MATTERS NOT IN ISSUE ARE GROSSLY IMPROPER AND SHOULD BE STRICKEN

Realizing his inability to prevail on the merits of the only issue before this Court—the application of the act of state doctrine to the Third Claim—Hunt seeks to persuade this Court to reinstate his Third Claim by invoking totally irrelevant, but highly inflammatory and indiscriminate charges, of secret "massive payments" to foreign government officials in order to promote corporate objectives and other similar accusations. These inflammatory statements are grossly improper, are completely irrelevant to this action and have no foundation in the pleadings or record of this case. They should be stricken.

Hunt argues that multinational corporations, including several of these defendants, "secretly make massive payments to foreign government officials in order to promote corporate objectives," that "[e]ach day the newspapers report new disclosures of the way in which multinational corporations routinely purchase the services of key foreign officials," that this Court should not "put its imprimature" [sic] upon the suggestion that companies may "eliminate their competitors by implicating one of these complaisant officials in their schemes" and that "[s]everal of the named defendants here have publicly confessed to making payments to foreign officials to induce them to advance their patron's competitive position" (Brief for Appellants at pp. 19, 36).[1]

But nowhere in the complaint is there a single allegation charging defendants with payments to foreign government officials in order to promote their corporate objectives, or a single allegation that any defendant routinely purchased the services of key foreign officials, or a single allegation that these defendants sought to eliminate Hunt by implicating foreign officials in their alleged conduct.

Indeed, plaintiffs' counsel during oral argument before the District Court on his Rule 54(b) application expressly disavowed any contention that the Third Claim involved the very kind of alleged influence of foreign officials upon which his present appeal brief rests in large part. At the hearing counsel stated:

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[1] In his brief, Hunt attributes to Judge Weinfeld the statement that recent disclosures regarding dealings with foreign governments by multinational companies "including several named defendants" (Brief for Appellants at pp. 16, 36), are a reason for reassessment of the scope of the act of state doctrine. In point of fact, Judge Weinfeld nowhere in his opinion attributes improper conduct to "several named defendants." (See JA 102, 123).

> It is *not* our contention under Count 3 that the defendants procured governmental action in some improper way against my client. It is our contention that in the guise of dealing with us as part of some joint enterprise, negotiations with the Libyan government were manipulated and we were manipulated. (Emphasis added; Record at 117, p. 37)

In reality, what plaintiffs are now asking this Court to do is to speculate as to these defendants' relationships with officials of foreign governments, including Libya, and to render an advisory opinion on the basis of such speculation. It goes without saying that the giving of such advisory pronouncements upon hypothetical assumptions, and the rendering of such tentative guidelines for the District Court's direction, is a task which plaintiffs may not appropriately ask this Court to undertake. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 451 (1945); *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947).

IV.

THE DISTRICT COURT'S CERTIFICATION OF THE DISMISSAL OF THE THIRD CLAIM OF THE COMPLAINT AS FINAL AND APPEALABLE UNDER RULE 54(b) SHOULD BE VACATED AND THE APPEAL DISMISSED

Upon motion by Hunt pursuant to Rule 54(b), F.R.C.P., the District Court entered on January 22, 1976 an order directing entry of final judgment dismissing the Third Claim of the complaint (JA 122-124). Pursuant to that Rule 54(b) order, final judgment dismissing the Third Claim as to all defendants was entered on February 5, 1975 (JA 126) in order to permit this interlocutory appeal.

Although the parties herein have focused on the merits of the dismissal of the Third Claim of the complaint as the central issue on appeal, defendants suggest that this Court may also wish to consider the propriety of the Rule 54(b) certification. If the District Court abused its discretion in certifying the dismissal of the Third Claim as final, this Court is without jurisdiction at this time to entertain the appeal. *See, Campbell* v. *Westmoreland Farm, Inc.*, 403 F.2d 939, 942-943 (2d Cir. 1968); *Gumer* v. *Shearson, Hammill & Co., Inc.*, 516 F.2d 283, 285-286 (2d Cir. 1974).[1]

A. The Proper Standards For The Exercise Of Discretion Under Rule 54(b)

The appropriate exercise of a district court's discretion with respect to Rule 54(b) certification was set forth in the case of *Panichella* v. *Pennsylvania Railroad Co.*, 252 F.2d 452 (3rd Cir. 1958) as follows:

> [O]rdinarily an application for a Rule 54(b) order requires the trial judge to exercise considered discretion, *weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present.* Indeed, the draftsmen of this Rule have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power to afford a remedy in the infrequent harsh case. . . .'' 28 U.S.C.A., Federal Rules of Civil Procedure, 118-119 note. *It follows that 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice* and the

[1] The discretion which Rule 54(b) confers upon the district court is not absolute: "[A]ny abuse of that discretion remains reviewable by the Court of Appeals." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956); *see also, Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.*, 243 F.2d 795, 796 (2d Cir. 1957).

> more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule. (252 F.2d at 455; emphasis added)

This Court has consistently held the same view. *See, e.g., Campbell* v. *Westmoreland Farm, Inc., supra*, 403 F.2d at 942;[1] *Western Geophysical Co.* v. *Bolt Associates, Inc.*, 463 F.2d 101, 103 (2d Cir. 1972); *Gumer* v. *Shearson, Hammill & Co., Inc., supra*, 516 F.2d at 286; *Luckenbach S. S. Co.* v. *H. Muehlstein & Co.*, 280 F.2d 755, 758 (2d Cir. 1960).

Accordingly, even though Rule 54(b) empowers the district court to enter a final judgment as to fewer than all of the claims, this rule does not represent a departure from the fundamental federal principle against hearing cases at the appellate level in piecemeal fashion. The Supreme Court in *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956), held that:

> The amended rule [54(b)] preserves the historic federal policy against piecemeal appeals in many cases more effectively than did the original rule.

The strong federal policy against piecemeal appellate review requires that the district court make the express determination of finality under Rule 54(b) only in the rare case where failure to do so will create substantial hardship or unfairness if an immediate appeal is denied. *See, e.g., Campbell* v. *Westmoreland Farm, Inc., supra*, 403 F.2d at 942; *Gumer* v. *Shearson, Hammill & Co., Inc., supra*, 516 F.2d at 285-286.

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[1] In the *Campbell* case, this Court held that to warrant the entry of a Rule 54(b) order, "there must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal" (403 F.2d at 942).

B. The Factors Relied Upon By The District Court Do Not Justify The Rule 54(b) Certification

A review of the factors relied upon by the District Court in its Rule 54(b) determination reveals that, contrary to the Court's findings, the instant case did not present the special circumstances which justify the extraordinary relief of immediate interlocutory appeal.

(1) *Extra-Record Allegations Concerning Purported Misconduct of Multinational Corporations Were An Improper Basis for Granting the Rule 54(b) Certification*

The first and primary factor relied upon by the District Court was that there have been "public disclosures of dealings of multi-national corporations with foreign governments, including payments to influence such governments or their officials . . ." (JA 123). These disclosures, the Court observed, "warrant consideration in the public interest of the continued viability of the 'act of state' doctrine, which, if modified in any respect, may have a direct and significant bearing upon plaintiff's third claim" (JA 123).

But, as we have shown, the alleged misconduct of multinational corporations is totally irrelevant to the issues in the present case. Thus, the District Court's references to such "disclosures" can have no relevance here and cannot properly support the granting of the 54(b) certification.

Such alleged "disclosures" are also an impermissible basis for a Rule 54(b) certification for another reason. As outlined above, this Court in applying Rule 54(b) has uniformly held that the prejudice of denying an immediate appeal must directly affect the party requesting such relief, not the public generally. Rule 54(b) is not a

public interest rule.[1] Mere conjecture as to the public interest in general, rather than a showing of specific prejudice to these plaintiffs, is not enough.

(2) *The Fact That Immediate Appellate Review Of The Dismissal of the Third Claim May Avoid A Subsequent Trial Of That Claim Does Not Justify The Rule 54(b) Order*

The second factor relied upon by the District Court is as follows:

> Were plaintiff's instant motion under Rule 54(b) denied, and thereafter in the event of any appeal from any judgment entered with respect to plaintiff's first two claims, were this court's dismissal upon appellate review as to the third claim reversed, it would mean another long trial, as is forecast on the remaining claims. This would require a duplicative trial and additional but unnecessary expense to the parties (JA 123).

As in the case of the first factor above, the District Court's second consideration similarly does not demonstrate that this is the "infrequent harsh case" where direct and substantial prejudice will result to the plaintiffs if an immediate interlocutory appeal is denied. On the contrary, plaintiffs are simply in the same position as every other party who receives an adverse interlocutory order dismissing less than all of the claims of his complaint. In every such case, the appeal from the dismissed claim must await the trial or other disposition of the remaining claims. But that situation alone does not entitle a party to a Rule 54(b) certification; it being well settled that "the purpose of [Rule 54(b)] is not to encourage broadly piecemeal appeals *just because*

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[1] To the extent that there is any "public interest" intertwined with Rule 54(b), it is to eliminate costly and time-consuming piecemeal apeals such as the present one. *See, e.g., Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 437-438.

an appellant may be in a hurry." In re Bromley-Heath Modernization Comm., 448 F.2d 1271 (1st Cir. 1971) (Emphasis added).

C. This Court May Well Be Required To Review The Act of State Doctrine A Second Time In This Same Case

An immediate appellate review of the act of state doctrine as it applies to the Third Claim does not eliminate the likelihood of a subsequent appellate review of the applicability of this doctrine to the other antitrust claims in this case. As noted above, defendants also argued below that the First and Second Claims should have been dismissed under the act of state doctrine. While the defendants believe that the District Court should have so held on the bare allegations of the complaint, they are convinced that facts to be produced at trial will demonstrate that the offenses alleged in the first two claims are barred by the act of state doctrine.

In any event, it must be assumed, if and when the First and Second Claims reach this Court in the regular course, that this Court will probably be required to review the act of state doctrine in this case. Thus, for this Court to review this doctrine now would result in its considering the same issue twice in the same case.

This, we suggest, flies directly in the face of the well-established rule which condemns such practice. *See, Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360, 364 (3rd Cir. 1975); *Panichella* v. *Pennsylvania Railroad Co., supra*, 252 F.2d at 455; *Campbell* v. *Westmoreland Farm, Inc., supra*, 403 F.2d at 942-943. As this Court stated in *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc., supra*, 243 F.2d at 796:

> We cannot decide the issues intelligently piecemeal and, if we so attempt, are sure to find ourselves

uttering pious generalities only which will come back to plague us later.

In its order granting plaintiffs' Rule 54(b) motion as to the Third Claim, the District Court observed that "any change [in the act of state doctrine] may affect plaintiffs' first two claims since defendants also rely upon that doctrine in resisting them" (JA 123). Whether or not this proves to be so, it does not remove the substantial prospect that this Court will again be faced with the act of state doctrine in this same case.[1]

Judicial economy and the policy against piecemeal appeals dictate a single appellate consideration of the act of state doctrine as to *all* of the antitrust claims, rather than a piecemeal consideration of the issue on successive appeals as may well be the case if plaintiffs' present appeal is granted.

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[1] It was in part for this reason that defendants requested the District Court's permission pursuant to 28 U.S.C. § 1292(b) to apply for an interlocutory appeal from the Court's refusal to dismiss the First and Second Claims on act of state doctrine grounds, among others.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellees submit that the decision of the District Court dismissing the Third Claim of the complaint was correct and should be affirmed.

Respectfully submitted,

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April 26, 1976

CERTIFICATE OF SERVICE

I hereby certify that on or before the 26th day of April, 1976, I served the foregoing Brief of Defendants-Appellees upon the plaintiffs-appellants and upon the other defendants-appellees by depositing a copy in the United States mail, postage prepaid, addressed to the attorneys for the other defendants-appellees and to the following attorneys for plaintiffs-appellants:

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